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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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01-338

In the Matter of	)
	)
Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop	)

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OCT 27 2004

Federal Communications Commission
Office of Secretary

To: The Commission

PETITION FOR DECLARATORY RULING

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October 27, 2004

SUMMARY

This petition seeks a Commission declaration confirming that: (1) competitive LECs have a right to direct physical access to incumbent LECs' inside wire subloops in MTEs; (2) this right allows competitive LECs to obtain direct access to inside wire subloops at incumbent LECs' terminal blocks in MTEs; and (3) this right exists regardless of any state law or regulation that would otherwise limit it. Each of these points is contained in existing Commission precedent – particularly the *Triennial UNE Order* and the *Virginia Arbitration Order*. Recently, however, the Oklahoma Corporation Commission reached a decision that is incompatible with these principles. Specifically, the Oklahoma Commission held that competitive LECs are not entitled to direct access to incumbent LECs' MTE terminal blocks because, as a matter of state law, the incumbent LECs' network interface device is located at the customer premises rather than at the terminal block. Cox has challenged that decision before the United States District Court for the Western District of Oklahoma. Cox also has asked the court to stay its review until the Commission has clarified these important points of law.

This issue demands the Commission's attention for several reasons. First, the Oklahoma Commission decision is in direct conflict with the Commission's repeated determinations regarding access to the inside wire subloop. In both the *Triennial UNE Order* and the *Virginia Arbitration Order*, the Commission held that direct access was necessary and that impediments to access, including the specific requirements adopted by the Oklahoma Commission, were unlawful. The Oklahoma Commission's error must be corrected.

Second, any limitation of direct access at the local level impairs competitive LECs' ability to compete for customers in MTE environments. Alternative arrangements for gaining access to incumbent LECs' inside wire subloops are simply too expensive to allow facilities-

based competitive LECs to effectively introduce service in MTEs. These limitations conflict with the pro-competitive spirit and scheme mandated by the 1996 Telecommunications Act and the Commission's implementing regulations.

Third, the Oklahoma Commission's decision applies state law to trump the Commission's mandate of direct access to the inside wire subloop. By following the Oklahoma definition of "network interface device" rather than the definition that appears in the Commission's rules, the Oklahoma Commission all but eliminates the "inside wire subloop." No state can be permitted to give its local laws primacy over federal telecommunications law addressing the same issue. Accordingly, the Commission must clarify that its direct access rulings apply even where state law could be read to preclude it.

Finally, Commission action is necessary to prevent inconsistent state rulings on this issue. The Oklahoma Commission's decision conflicts with state commission decisions in New York, Washington, and Georgia. There is no justification for local variation of the direct access rule, which is designed to ensure competitive LEC access to the incumbent LEC's network at a point that is convenient to competitive LECs and does not endanger the incumbent LECs' networks. This split among the state commissions also defeats Congress's and the Commission's efforts to create a uniform nationwide policy promoting local telephone service competition.

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In the Matter of	)
	)
Clarification of the Commission's Rules and	)
Policies Regarding Unbundled Access to	)
Incumbent Local Exchange Carriers' Inside	)
Wire Subloop	)

To: The Commission

PETITION FOR DECLARATORY RULING

Cox Oklahoma Telcom, L.L.C. ("Cox"), by its attorneys and pursuant to Section 1.2 of the Commission's rules, hereby requests that the Commission issue a declaratory ruling clarifying that incumbent local exchange carriers' ("incumbent LECs") must allow competitive local exchange carriers ("competitive LECs") and their technicians to have direct access to the inside wire subloop in multi-tenant environments ("MTEs") for the purposes of performing installations.[1]

Commission action is necessary to resolve an emerging split among the state commissions as to how competitive LECs must be granted access to incumbent LECs' inside wire subloops. The several states to address this question have come to decidedly different conclusions, endangering the Commission's efforts to establish a uniform national standard regarding competitive LEC access to MTE customers. Virginia, New York, and Washington have ruled in favor of direct access. Georgia allowed indirect access, but created a different arrangement than any other state has used, requiring the incumbent LEC to construct, at its own

[1] 47 C.F.R. § 1.2 (2004).

cost, intermediate facilities to which the competitive LEC is entitled free and direct access. This confusion would be clarified by the requested declaratory ruling, which follows directly from the Commission's decisions in the *Triennial UNE Order*[2] and the *Virginia Arbitration Order*[3] and by the strong federal policy that the Commission has noted of encouraging local telephone competition for customers in MTEs.[4] Ensuring competitive access to incumbent LECs' inside wire subloops also would be consistent with the principles underlying the Telecommunications Act of 1996 (the "1996 Act"), because it would reduce the time, administrative burden, and expense for competitive LECs to obtain new customers.[5] In short, the requested ruling is consistent with all applicable laws, policies, and prior Commission pronouncements regarding competitive LEC access to the inside wire subloop, and it should be granted without delay.

Cox brings this issue before the Commission following a recent arbitration ruling by the Oklahoma Corporation Commission ("OCC") that adopted a proposal by Southwestern Bell Telephone ("SWBT") that would require Cox's telephone affiliate in Oklahoma to employ burdensome ordering procedures, undertake needless and time-consuming construction of new facilities, and rely on SWBT technicians to establish service connections for MTE customers wishing to subscribe to Cox's telephone service.[6] This ruling stemmed from the OCC's

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[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial UNE Order*").

[3] Petition of WorldCom, et al., *Memorandum Opinion and Order*, 17 FCC Rcd 27039 (2002) (the "*Virginia Arbitration Order*").

[4] See, *e.g.*, Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order in WT Docket No. 99-217, the Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and the Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-5715*, FCC Rcd 22938 ¶ 1 (2000).

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[6] *See Final Order Adopting and Modifying the Arbitrator's Report*, Order No. 491645, OCC Docket No. PUD 200300157 (the "*OCC Order*"). The *OCC Order* adopted with only a few minor modifications the report of the arbitrator that reviewed the dispute. *Report and*

erroneous interpretation of the Commission's rules and orders regarding competitive access to incumbent LECs' inside wire subloops. The OCC mistakenly concluded that the Communications Act and the Commission's rules left it free to apply Oklahoma law to the questions of what constitutes a network interface device (a "NID"), where on an incumbent LEC's network competitive LECs must be granted access to the inside wire subloop, and what rates, terms and conditions could be applied to such access, without reference to federal law. Cox has appealed the OCC's ruling to the United States District Court for the Western District of Oklahoma.[7]

That the question of whether the OCC has properly applied the Communications Act and the Commission's implementing regulations and orders is an issue that is within the primary jurisdiction and expertise of the Commission.[8] Accordingly, Cox is filing, contemporaneously with this petition, a motion to stay the court proceeding based on the primary jurisdiction of the Commission, to give the Commission the opportunity to resolve the question presented herein.[9]

I. Background

Cox is one of the largest facilities-based competitive LECs in the country, providing telecommunications services to over 1.2 million residential customers and 100,000 business customers in various markets throughout the country. Where it seeks to provide services to

Recommendations of the Arbitrator, OCC Docket No. PUD 200300157 (the "Arbitrator's Report"). Both the *OCC Order* and the Arbitrator's Report are attached hereto as Exhibit A to Attachment 1.

[7] Cox Oklahoma Telcom, L.L.C. v. Corporation Commission of the State of Oklahoma, No. CIV-04-1282L (W.D. Okla. filed October 6, 2004). A copy of the complaint is attached hereto as Attachment 1.

[8] *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004) (primary jurisdiction referrals are appropriate when an issue is clearly within an administrative agency's area of expertise).

[9] A copy of Cox's Motion to Stay Based on the Primary Jurisdiction of the Federal Communications Commission is attached as Attachment 2.

customers in MTEs, Cox must gain access to the inside wire subloop – that portion of the loop from the point the loop enters the end-user customer premises to the point of demarcation under Section 68.3 of the rules.[10] In many MTEs, the point of demarcation is at a standard NID or a terminal block placed at a central location at the incumbent carrier's point of entry to the MTE. In those cases, Cox and other facilities-based competitive LECs simply can disconnect the inside wire from the NID or terminal block and connect the wire to its own interface. In other cases, however, the point of demarcation in an MTE is not at the terminal block, and a portion of the inside wire subloop extends farther into the customer premises, typically to a point approximately twelve inches from an individual resident's unit. As a practical matter, Cox and other competitive LECs must have access to the inside wire subloop to reach potential customers in MTEs regardless of whether the demarcation point is located at the terminal block or at the customer premises.

In Cox's experience, regardless of the location of the point of demarcation, most incumbent LECs permit a competitive LEC to disconnect the inside wire subloop from the incumbent LEC terminal block and connect it to the competitive LEC interface without any involvement by the incumbent LEC. This is a simple task and does not pose any risk to the incumbent LEC network or to the provision of telephone service. Cox, in fact, has performed this routine function more than 100,000 times in Oklahoma alone and has experienced trouble on only one occasion since 1999. That problem involved accidentally changing the wrong customer's line; it was easily remedied and did not threaten the incumbent LEC network or customer safety in any way. In fact, Cox successfully performs the identical function in MTEs

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[10] 47 C.F.R. §§ 51.319(a)(2)(i), 68.3.

across the country without incident, using technicians that undergo the same training that incumbent LEC technicians receive. Indeed, Cox has experienced more trouble in the relatively small number of cases when the incumbent LEC has switched a customer back to its network.

Nevertheless, a few incumbent LECs do not permit competitive LECs direct physical access to inside wire subloops at the MTE terminal block. These incumbent LECs insist on procedures that create inefficiencies and impose unnecessary cost and substantial delay on competitive LECs like Cox and their potential customers. This is the case in Oklahoma, where Cox interconnects with SWBT, the predominant incumbent local exchange carrier in the state, by the terms of an interconnection agreement negotiated pursuant to Sections 251 and 252 of the Communications Act.[11]

An unusually large number of Oklahoma residents inhabit MTEs where wiring controlled by the incumbent LEC reaches all the way to the individual dwelling unit.[12] Although SWBT and the OCC contend that the NID is at the first jack in each unit, as Cox discusses below, under the FCC's regulations and orders, the terminal block is the relevant point of interconnection. As described above, to gain access to MTE customers, competitive LECs like Cox must have access to the incumbent carrier-owned inside wire subloop.[13] As negotiated, the ICA between Cox and SWBT did not contain provisions specifically governing Cox's access to SWBT's inside wire

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[11] Cox and SWBT originally entered into an interconnection agreement on April 10, 1997. The OCC approved that agreement by Order No. 412966, dated May 28, 1997. In 2002, Cox and SWBT entered into a new interconnection agreement. The OCC approved the new agreement by Order No. 466056, dated July 26, 2002. The governing interconnection agreement between Cox and SWBT in Oklahoma is hereinafter referred to as the "ICA."

[12] In the Oklahoma proceeding, SWBT claimed that the demarcation point in residential MTEs is located at the first telephone jack in the customer premises.

[13] SWBT owns or controls many, but not all, inside wire subloops in Oklahoma multi-unit buildings. Only the inside wire subloops that are under incumbent carriers' ownership or control are at issue in this proceeding. Premises wiring that is under the ownership or control of a building owner, the tenant, or Cox, is not at issue in this proceeding.

subloops. In October 2002, Cox and SWBT began negotiating an amendment to the ICA that would govern the rates, terms, and, conditions of such access. After failing to reach agreement, Cox submitted this issue to arbitration before the OCC pursuant to Section 252(b) of the Act.[14]

In the arbitration proceeding, Cox asserted that the Act and the Commission's rules and orders mandate that competitive LECs' technicians must be given direct physical access to SWBT's inside wire subloops at existing SWBT terminals for the purposes of accomplishing installation and service changes. Cox proposed rates, terms, and conditions that recognized this right, including rates for a monthly, recurring, per-line fee, but not for the cost of physically providing cross-connect or conduit installation services, because those activities would be performed by Cox technicians, not by SWBT. Cox also proposed rates, terms, and conditions that would apply if Cox technicians were unable to gain access to SWBT's terminal using SWBT's approved standards and practices. In such cases, Cox proposed to provide a service order to SWBT and to pay for the cost of an SWBT technician to make a service call to physically provide cross-connect and conduit installation services.[15]

SWBT denied that Cox had a right of direct physical access to its inside wire subloops. Instead, SWBT proposed three complex, time-consuming, and costly options, each one of which would effectively deny Cox reasonable access to SWBT's inside wire subloops.[16] Under each of SWBT's three proposed options, Cox would be required to use SWBT technicians to provide

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[14] Oklahoma Corporations Commission, Docket No. PUD 200300157 (filed March 28, 2004). *See also* 47 U.S.C. § 252(b).

[15] A full description of Cox's proposal is contained in Cox's Complaint. *See* Attachment 1 at 10-12, ¶¶ 42-46. Cox notes that it is not seeking a declaration as to the merits of its proposal to the OCC.

[16] A full description of SWBT's proposal is contained in Cox's Complaint. *See* Attachment 1 at 6-10, ¶¶ 26-41.

access to the inside wire subloop and to pay impractically high rates for those services.[17] Furthermore, under two of SWBT's proposals, Cox would be required to construct, or to pay SWBT to construct, unnecessary intermediate facilities between SWBT's and Cox's terminal facilities in each MTE. Each of these options would increase both the cost of providing service to MTE customers and the time – sometimes as long 120 days – it would take for Cox to initiate service to a requesting customer. SWBT would maintain the enormous competitive advantage inherent in operating legacy facilities that can be used to initiate service in a matter of hours or a few days. Thus, each of SWBT's proposals would greatly impair Cox's efficient use of SWBT's inside wire subloop facilities and effectively stymie Cox's efforts to compete fairly for SWBT customers in MTEs.

On April 2, 2004, the arbitrator issued a report adopting, in its entirety, SWBT's proposal.[18] Despite Cox's specific and repeated citation of governing federal law and Commission precedent, the arbitrator concluded that the Commission's rules do not require incumbent LECs to provide competitors with direct physical access to the inside wire subloop and that the direct access question was appropriately resolved under Oklahoma law.[19] In reaching that conclusion, the arbitrator accepted SWBT's assertions that denial of direct access was essential to the integrity of SWBT's network.[20] Cox appealed the matter to the full OCC,

[17] Cox's Complaint also contests the rates that SWBT proposes for the services it would provide under its proposal as unjustified under TELRIC. Cox is not seeking a declaration from the Commission on this issue. Attachment 1 at 21-24, ¶¶ 97-111.

[18] *See* Arbitrator's Report, *supra* note 6.

[19] *Id.* at 43, 46-47.

[20] *Id.* at 45-46.

and on June 28, 2004, the OCC affirmed the Arbitrator's Report without any detailed analysis and only slight modifications.[21]

II. The Commission Has Found that Its Rules Require Incumbent LECs to Provide Competitive LECs with Direct Physical Access to the Inside Wire Subloop.

Under the Act and the Commission's rules, competitive LECs have a right to purchase access to incumbent LEC subloops and to obtain access to those subloops at any technically feasible accessible terminal along the incumbent LECs' distribution path.[22] For competitive LECs attempting to access customers in MTEs, the most practical place to gain access to incumbent LEC subloops is at the incumbent LEC's terminal block, where network wiring is disaggregated into individual customer inside wiring. In two recent decisions, the Commission has recognized competitive LECs' right to direct physical access to incumbent LEC networks at the incumbent's terminal block.

In its recent *Triennial UNE Order*, the Commission declared that statutory and regulatory responsibilities require incumbent carriers to provide competitive carriers with direct physical access to the inside wire subloop.[23] The Commission stated that "[a] competitor purchasing a subloop from an incumbent LEC to serve a particular customer location will access the

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[21] *See OCC Order*, *supra* note 6. The OCC also ordered the parties to submit a revised interconnection agreement complying with the OCC's decision within thirty days of the effective date of the order. Thereafter, the parties filed a signed amendment to their ICA incorporating the rates, terms and conditions approved by the OCC, and, with Cox reserving its right to appeal the OCC's decision, the OCC approved the amended ICA on September 7, 2004. *See Order Approving Amendment to Interconnection Agreement Conforming to Commission Order 491645*, Order No. 494596, OCC Docket No. PUD 200400338. This Order is attached to Attachment 1 as Exhibit B.

[22] 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.319(a)(2); *Triennial UNE Order*, 18 FCC Rcd at 17185. The Commission noted that access points along the distribution path include, but are not limited to, a feeder distribution interface, a pole or pedestal, the minimum point of entry, or the network interface device. *Id.*

[23] *Triennial UNE Order*, 18 FCC Rcd at 17184-86, n.1013 (2003).

incumbent LEC's loop along its distribution path at a technically feasible accessible terminal."[24] The Commission noted that "accessible terminals contain cables and . . . wire pairs . . . which enables a *competitor's* technician to cross-connect its terminal to the incumbent LEC's to access the *incumbent* LEC's loop from that point all the way to the end user customer."[25] Thus, the Commission confirmed that purchase of the inside wire subloop includes direct physical access to whatever terminal to which the inside wire attaches. The *competitive LEC* is entitled to access the terminal and the *competitive LEC's technician* is entitled to perform the connection.

Moreover, the Commission treated direct physical access as a competitive LEC right when discussing the terms upon which they are entitled to direct physical access to incumbent LECs' inside wire terminals, stating that "a competitive LEC seeking to make contact with the incumbent LEC's NID *so that the competitive LEC can reconnect such customer wiring to its own NID* is not accessing the incumbent LEC's NID as a UNE."[26] For this to be the case, as a matter of logic, the purchase of the inside wire subloop must include access to the NID or terminal block. The Commission's finding that purchase of the inside wire subloop includes access to the terminal block in an MTE precludes SWBT's proposals, which would permit the incumbent LEC either (1) to physically mediate competitive LEC access to the terminal block (and, by extension, to the inside wire subloop) by requiring the presence of an incumbent LEC technician; or (2) to effectively deny access to the terminal block by requiring competitive LECs to access the incumbent LEC network through newly constructed facilities.

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[24] *Id.* at 17185. The Commission further noted that technically feasible terminals "include, but are not limited to, a feeder distribution interface (FDI); a pole or pedestal; the MPOE [Minimum Point of Entry]; or the NID." *Id.*

[25] *See id.* (emphasis added).

[26] *Triennial UNE Order*, 18 FCC Rcd at 17199 (emphasis added).

The OCC's denial of competitive LECs' right to direct physical access to the inside wire subloop is directly contrary to these and other Commission rulings. Remarkably, despite the Commission's extended discussion of access to the unbundled inside wire subloop, the OCC dismissed the Commission's affirmation of competitive LECs' rights as "a passing reference."[27] In so concluding, the OCC ignored explicit Commission findings that the type of indirect access SWBT proposed would not comply with the Commission's regulations.[28] Most recently, in the *Triennial UNE Order*, the Commission rejected any incumbent carrier access scheme that would require competitive carriers "to undertake a lengthy and burdensome process at the customer premises to 'collocate' a separate terminal facility in order to gain access to the inside wire subloop . . ."[29] This hypothetical arrangement, which the Commission expressly rejected, is indistinguishable from two of the three SWBT access options, both of which require Cox to construct intermediate facilities between SWBT's terminal and Cox's terminal or to engage SWBT to construct such facilities. In approving these SWBT proposals, the OCC ignored the Commission's pronouncements and instead adopted the most burdensome arrangement possible, specifically requiring the kind of "collocation" that the Commission expressly has barred.

The Commission also prohibits any arrangements that would require an incumbent local exchange carrier's technician to be present when a competitive carrier seeks to disconnect wires on the customer side of the incumbent LEC's terminal so that they can be reconnected to the competitive LEC's terminal.[30] This Commission ruling plainly precludes the SWBT-proposed

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[27] Arbitrator's Report at 47.

[28] *Triennial UNE Order*, 18 FCC Rcd at 17198-99.

[29] *Id.* at 17199. As the *Triennial UNE Order* notes, this discussion addresses concerns raised in a letter from Cox's counsel to the Commission that described a scenario identical to two of SWBT's proposals in Oklahoma. *Id.* at 17198-99 & n.1090.

[30] *Id.*

option that would require SWBT technician to be present at some point preceding all cross connections. Contrary to the OCC's findings, the import of the Commission's ruling in the *Triennial UNE Order* is to confirm that the Commission's rules require incumbent LECs to allow competitive LECs direct physical access to the inside wire subloop.

The OCC's denial of direct physical access to the inside wire subloop also is inconsistent with the Commission's *Virginia Arbitration Order*. In that case, the Commission ruled that two carriers had a right to direct physical access to Verizon's terminal block when seeking to provide service to customers in MTEs. First, the Commission found that Worldcom's proposed contract "language enabling its technicians to have direct access to the customer side of Verizon's NID is consistent with the Act and our rules," whereas Verizon's proposal "that all cross connection be performed by Verizon technicians," was not.[31]

In that same proceeding, the Commission resolved a similar issue in favor of AT&T and against Verizon, finding that "AT&T . . . should have direct access to all wire on the customer side of the NID, *even where that wire is owned by Verizon.*"[32] This holding is consistent with the Commission's later conclusion in the *Triennial UNE Order* that "[t]he technically feasible points where subloops can be accessed can be further categorized as local loop plant consisting of customer premises wiring owned by the incumbent LEC as far as the point of demarcation."[33] The Commission's intent was to allow competitive LECs to access incumbent LEC-owned inside wire subloops at any technically feasible point, regardless of whether that plant ended at the terminal block or extended to the point of demarcation.

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[31] *See Virginia Arbitration Order*, 17 FCC Rcd at 27247.

[32] *See id.* at 27243 (emphasis added). In the Virginia case, the terminal block was the relevant NID.

[33] *See Triennial UNE Order*, 18 FCC Rcd at 17185.

The OCC also failed to follow the *Virginia Arbitration Order* on the issue of whether direct physical access to incumbent LECs' inside wire subloops will impair the functioning of LEC networks. In the *Virginia Arbitration Order*, the Commission expressly found that granting direct access to AT&T would not conflict with Verizon's desire to maintain the security and integrity of its network and that "dispatching a Verizon technician to perform or oversee AT&T's work on the customer side of the NID is unnecessary to address the security concerns identified by Verizon in this proceeding."[34] The Commission's decision on this point is incontrovertible. When competitive LECs access the inside wire subloop at the incumbent LEC's terminal block, they are accessing only a single customer's inside wiring. Network integrity is not an issue because the competitive LEC is not accessing the portion of the LEC loop that consists of aggregated customer lines. The worst potential consequences of competitive LEC access on the customer-side of the incumbent LECs' terminal block are crossed wires and temporarily mishandled service for no more than a handful of customers. Despite the Commission's explicit rejection of the argument that customer-side access to inside wiring creates serious network integrity issues, the OCC improperly relied on this rationale in denying Cox's request for direct physical access to SWBT's inside wire subloops.

III. The Commission Should Confirm That Its Requirement of Direct Physical Access to Inside Wire Subloops Applies Regardless of How State Commissions Define "Network Interface" or "Demarcation Point."

The Commission should clarify and confirm that federal law rather than state law controls access to the inside wire subloop and that state law classifications regarding the locations of the points of demarcation and the NIDs must be subordinated to the federal UNE

[34] *See id.*

rules. The OCC's failure to apply the Commission's precedents regarding competitive LEC access to incumbent LEC inside wire subloops results from a difference between how the Commission and the OCC view the location and significance of points of demarcation and NIDs. The OCC determined that the *Virginia Arbitration Order* did not provide precedent for Oklahoma because, in that case, the Commission permitted competitive LEC's to have direct access to the incumbent LEC network only at the "customer-side" of the NID, whereas direct access to SWBT's terminal block would require access to the SWBT's network on the "network-side" of the NID.[35] This conclusion is based on an Oklahoma-specific definition of the NID that is inconsistent with the Commission's definition. It leads to results that contradict the Commission's conclusions in the *Virginia Arbitration Order* and the *Triennial UNE Order*. Because the inside wire subloop access rules are part of a federal policy concerning local exchange competition, the Commission should confirm that its definition of the NID must prevail whenever it comes into conflict with a contrary state-level definition.[36]

Under both the Commission's rules and those of the OCC, the point of demarcation marks the point at which incumbent LEC ownership of the inside wire ceases and where customer ownership begins.[37] But the Commission defines the NID differently than does the OCC. In the *Triennial UNE Order*, the Commission defined the NID as "the functionality that connects the distribution plant to the customer premises wiring,"[38] and it has defined "customer

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[35] Arbitrator's Report at 47.

[36] 47 U.S.C. § 251(d)(3)(C).

[37] *Compare Virginia Arbitration Order*, 17 FCC Rcd at 27240 (describing demarcation point as "an incorporeal boundary denoting ownership) *and* Arbitrator's Report at 44 (describing the demarcation point as the boundary between "the network owned or controlled by SBC-OK and the wiring and telephone equipment belonging to the MTE tenant customer."). *See also* 47 C.F.R. § 68.3.

[38] *Triennial UNE Order*, 18 FCC Rcd at 17195, n.1066.

premises wiring" to encompass all wiring both on the premises of an end user and on the premises of a landlord or property owner in an MTE.[39] In describing the relationship between the NID and the point of demarcation under the Commission's rules, the Commission has stated that "[t]he distinction between the demarcation point, which is an incorporeal boundary denoting ownership, and the NID, which is equipment for connecting customer-side wiring to network-side wiring, is important to any discussion of the inside wire subloop, which consists of wire that, although on the customer side of the NID, is nonetheless on the network side of the demarcation point."[40]

The Commission's pronouncements make clear that, under federal law, the NID at issue when determining competitive LECs' inside wire subloop access rights in an MTE is the terminal block or any other location where incumbent LEC distribution plant is separated into individual customer-dedicated inside wiring.[41] Under this framework, "network-side" wiring consists of the switch-side loop facilities that connect to the terminal block, whereas "customer-side" wiring refers to that wiring that connects the terminal block to the customers' facilities. Conversely, with respect to the point of demarcation, "network-side" wiring is owned by the incumbent LEC, whereas "customer-side" wiring is owned by the customer.

The OCC ignored this distinction, relying instead on its own definition. Under the OCC's regulations, the "Network Interface" is defined as "the normal demarcation point separating the telecommunications service provider's regulated facilities and equipment from the unregulated facilities, equipment, or systems provided by the end-user."[42] The OCC found that

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[39] *Id.* at n.1021 (citing *UNE Remand Order*, 15 FCC Rcd at 3744; 47 C.F.R. § 68.105(b).
[40] *Virginia Arbitration Order*, 17 FCC Rcd at 27240.
[41] *E.g.*, *Triennial UNE Order*, 18 FCC Rcd at 17194, n.1064.
[42] OKLA. ADMIN. CODE § 165:55-1-4.

under its rules "the Network Interface must be located at the same point as the Demarcation Point on SBC-OK's network," and that the "Network Interface Device" – a term not defined in the OCC's rules – consists of "a standard jack or its equivalent installed at the demarcation point at the tenant customer's premise."[43] While this definition of NID may be acceptable for purposes of applying Oklahoma's laws and regulations, for purposes of applying the federal rules it plainly is inconsistent with the Commission's definition, which acknowledges that the NID and the demarcation point can be in different places and that the "demarcation point may be located at the NID, before the NID, or beyond the NID."[44]

The effect of the OCC's requirement that the demarcation point and the NID be located at the same point on the LEC network is that the inside wire subloop – which competitive LECs must use to serve MTEs efficiently – effectively disappears. Competitive LECs are forced to accept unreasonable conditions on access to the incumbent LEC's inside wiring like those adopted by the OCC or to provision duplicative facilities to each tenant dwelling. These are precisely the results that the Commission's inside wire subloop rules are designed to prevent.

To ensure that state-specific regulations and the peculiarities of local ownership of wiring inside MTEs do not impede the achievement of the federal policies of ensuring fair competition in and national uniformity of access to MTEs, the Commission should clarify that its pronouncements regarding direct physical access to incumbent LECs' inside wire subloops apply regardless of variations in state-level requirements.

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[43] Arbitrator's Report at 44.

[44] *Triennial UNE Order*, 18 FCC Rcd at 17186.

Moreover, finding that the federal scheme controls does no violence to Oklahoma's other regulatory efforts. There is no need to adopt the FCC's approach for other, purely local concerns.

IV. The Requested Declaratory Ruling Will Eliminate Uncertainty, Ensure Consistent Determinations By State Commissions, And Increase Competition In Local Telephone Markets.

The OCC's confusion regarding the Commission's inside wire subloop rules shows that a declaratory ruling is needed to eliminate any lingering uncertainty regarding competitive LECs' right to direct physical access to incumbent LECs' inside wire subloops. Although the Commission did much to eliminate this uncertainty in the *Virginia Arbitration Order* and the *Triennial UNE Order*, some incumbent LECs continue to take SWBT's position that direct access is not required if the incumbent LEC owns the wiring on the customer side of its terminal block. Litigating these claims before multiple state commissions would waste the time and resources of competitive LECs and state commissions. The burden will fall heaviest on competitive LECs like Cox, however, that must choose between dedicating scarce resources to legal battles or providing service to MTE customers on an economically inefficient basis. The added costs of either option simply increase the cost of providing service and reduce competition.

Finally, unless the Commission clarifies competitive LECs' rights, this issue will continue to be treated inconsistently by the several state commissions and, potentially, by the courts. In fact, there have been at least three different resolutions of this issue at the state level. In addition to the Commission's treatment of the direct access issue in the *Virginia Arbitration*

Order,[45] state commissions in New York and Washington have affirmed competitive LECs' right of direct access to incumbent LEC terminal blocks.[46] The Washington Commission held that "the CLEC is allowed to make connections directly to inside wiring, whether customer-owned or [incumbent LEC]-owned" and that the "[incumbent LEC] must allow cross-connection at multi-Tenant Environments . . . and may not require collocation for such access."[47] Similarly, the New York Commission recognized competitive LECs' right of access, holding that "direct access to house and riser cable owned by other carriers will reduce costs . . . thereby enhancing competition."[48] The New York Commission went on to require essentially the same safeguards against competitive LEC damage to incumbent LEC facilities that the OCC rejected, *e.g.*, a requirement that the competitive LEC utilize the same standards and practices as the incumbent LEC when directly accessing incumbent LEC facilities.

On the other hand, the Georgia Commission permitted an incumbent LEC to require a competitive LEC to access the incumbent LEC's terminal facilities through intermediate

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[45] In that case the Commission fulfilled the role of the Virginia Corporations Commission under 47 U.S.C. § 252(e)(5) because the Virginia Commission had refused to apply federal law to interconnection agreement arbitration proceedings. *E.g.*, Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 6224 (2001).

[46] Staff's Proposal to Examine the Issues Concerning the Cross-Connection of House and Riser Cable, *Order Granting Direct Access Cross-Connections to House and Riser Facilities, Subject to Conditions*, Case No. 00-C-1931 (NY Pub. Serv. Comm'r rel. June 8, 2001) ("*New York Order*"); AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation, *Second Supplemental Order*, Docket No. UT-003120 (Wash. Pub. Util. and Trans. Comm'n rel. April 5, 2001) ("*Washington Order*"). Each of these decisions were adopted prior to the *Virginia Arbitration Order* and the *Triennial UNE Order*, but as described herein, those decisions only strengthen the Washington and New York Commissions' decisions.

[47] *Washington Order* at 21, ¶¶ 86-87.

[48] *New York Order* at 5-6.

facilities like those proposed by SWBT before the OCC.[49] Unlike the OCC, however, the Georgia Commission concluded that if the incumbent LEC insists on an intermediate facility, then it must build and pay for that facility and provide competitive LECs with access to that facility as part of the competitive LECs' purchase of the inside wire subloop.[50] Thus even where another state Commission has denied competitive LECs' direct access to incumbent LEC terminal facilities, that decision was more pro-competitive and faithful to the Commission's rules than the OCC decision.

Together with the OCC's decision, these rulings create three inconsistent regulatory regimes for access to the inside wire subloop. Allowing these conflicting decisions to proliferate would frustrate the Commission's national policy of ensuring local competition for MTE customers in every market. As the Commission knows, establishing certainty on inside wire access issues is critical to encouraging fair competition in MTEs. Only the Commission can settle the requirements of the 1996 Act and eliminate the conflicting rules currently prevailing in the states.

CONCLUSION

For the reasons stated above, Cox requests that the Commission issue a declaratory ruling confirming that:

(1) Competitive LECs have a right to direct physical access to incumbent LECs' inside wire subloops in MTEs;

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[49] Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996, *Order*, Docket No. 11853-U, 2001 Ga. PUC Lexis 68 (Ga. Pub. Util. Comm'n released Mar. 6, 2001) ("*Georgia Order*").

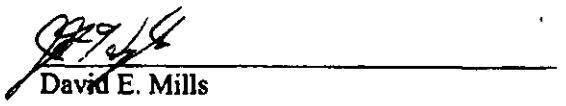
[50] *Georgia Order* at *16.

(2) This right allows competitive LECs to obtain direct access to inside wire subloops at incumbent LECs' terminal blocks in MTEs;

(3) This right exists regardless of any state law or regulation that would otherwise limit the right.

Respectfully submitted,

COX OKLAHOMA TELCOM, L.L.C.



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October 27, 2004

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Clarification of the Commission's Rules and	)
Policies Regarding Unbundled Access to	)
Incumbent Local Exchange Carriers' Inside	)
Wire Subloop	)

To: The Commission

DECLARATION OF KATY BOREN

1. My name is Katy Boren and I am the Director of Regulatory Affairs for Cox Oklahoma Telcom, L.L.C.

2. I have read the foregoing "Petition for Declaratory Ruling" (the "Petition") and I am familiar with the contents thereof.

3. I declare under penalty of perjury that the facts contained herein and within the foregoing Petition are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry, that the Petition is well grounded in fact, that it is warranted by existing law or a good-faith argument for the extension of existing law, and that it is not interposed for any improper purpose.

Katy Boren
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October 26, 2004